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MICHAEL RODAK, JR., CLE

No. 79-1561

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES WINFRED CARPENTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 611 F. 2d 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a-12a) was entered on February 4, 1980, and a petition for rehearing was denied (Pet. App. 12a-13a) on March 7, 1980. The petition for a writ of certiorari was filed on April 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government was barred from prosecuting petitioner under the Hobbs Act, 18 U.S.C. 1951, because he was also subject to prosecution for his

extortionate conduct under the federal bank robbery statute, 18 U.S.C. 2113.

2. Whether petitioner's post-arrest statements were improperly admitted into evidence because they were the product of interrogation by FBI agents.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-10a).

The evidence at trial showed that on October 18, 1978, petitioner abducted Jeff Austin, III, the son of a couple who were the president and vice-president of a bank in Jacksonville, Texas (Pet. App. 2a). After forcing the young Austin back into his home at gunpoint, petitioner blindfolded and bound him (Tr. 40-41, 58-60). Petitioner then dialed the telephone number of the bank and directed Austin to speak to his parents (Pet. App. 2a). Austin spoke to his stepmother, told her that he had been kidnapped, and said that the abductor wanted $38,000 in ransom and would contact her in an hour concerning the location for delivery of the money (*ibid.*; Tr. 43-44, 77-78). After the first delivery of the ransom fell through, petitioner called Mrs. Austin to direct that a second delivery be made (Pet. App. 3a). Mrs. Austin had a second $38,000 withdrawn from the bank's general account and complied with petitioner's directions for the dropoff of the package of money (*ibid.*; Tr. 81-83). The money was picked up by two boys, who later

[1]Petitioner was acquitted on one count charging him with using a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c).

identified petitioner as the man who had offered them money for picking up the package (Pet. App. 3a). Unbeknownst to petitioner, Jeff Austin, III, was rescued by police prior to the time that petitioner made another call to Mrs. Austin concerning the second delivery (Tr. 83).

Petitioner was arrested by FBI agents shortly after 6:00 p.m. that same evening (Tr. 345). He was orally advised of his rights but declined questioning and said that he wanted to consult with an attorney (Pet. App. 7a-8a; Tr. 348). He did, however, sign a consent to search form (Tr. 358). No questioning took place during the search. At about 7:00 p.m. petitioner was placed in a car for transportation to the nearest FBI office (Tr. 364). He was again advised of his rights and signed a form indicating that he understood those rights, but he said once more that he did not want to make a statement (Tr. 349-350, 352). Nonetheless, petitioner made incriminating statements during the 20-minute trip to the FBI office (Pet. App. 8a-9a; Tr. 354-356, 365).[2] Petitioner testified at the suppression hearing that the FBI agents engaged in a subtle form of interrogation during the trip (Pet. App. 9a; Tr. 380-383). However, the FBI agents testified that they did not discuss the present case or any FBI work and did not question petitioner during the ride to the office (Pet. App. 8a; Tr. 353-362, 364-367). The district court credited the FBI agents' suppression hearing testimony and allowed the agents to testify at trial about petitioner's statements (Pet. App. 9a).

[2]Petitioner denied that his girlfriend was involved in "this matter" and stated that he had deliberately quarrelled with her to keep her away from the location of the money drop. He also said that his involvement stemmed from money pressures, but he claimed that he had merely followed the directions of another individual (Pet. App. 7a-8a n.5; Tr. 354-356, 365).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the application of the Hobbs Act, 18 U.S.C. 1951, to his conduct conflicts with the Ninth Circuit's decision in *United States* v. *Snell*, 550 F. 2d 515 (1977), that the bank robbery statute, 18 U.S.C. 2113, is the exclusive means for punishing extortionate activity directed at a bank. *Snell* has, however, been overruled by the Ninth Circuit in *United States* v. *LaBinia*, 614 F. 2d 1207, 1210, cert. denied, No. 79-6501 (May 27, 1980), so no conflict exists.[3] Moreover, the decision below is plainly correct and does not merit further review.

As both the court below and the Ninth Circuit in *LaBinia* recognized, this Court's decision in *United States* v. *Culbert*, 435 U.S. 371 (1978), forecloses any argument that the Hobbs Act does not reach extortionate conduct otherwise within its reach merely because the same conduct may fall within the coverage of another statute.

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[3]In his petition for certiorari LaBinia alleged a conflict with *United States* v. *Beck*, 511 F. 2d 997 (6th Cir.), cert. denied, 423 U.S. 836 (1975), and *United States* v. *Canty*, 469 F. 2d 114 (D.C. Cir. 1972). *Canty* involved a prosecution for bank robbery and assault with a dangerous weapon. As the D.C. Circuit later pointed out, however, the error in *Canty* lay not in prosecuting on overlapping charges, but rather in multiple sentencing. *United States* v. *Shepard*, 515 F. 2d 1324, 1335 (D.C. Cir. 1975). Here, there is no multiple sentencing.

The Sixth Circuit did hold in *Beck* that convictions for extortion under the Hobbs Act and bank robbery under 18 U.S.C. 2113(b) could not both stand, and stated in passing that the bank robbery statute was intended to be the exclusive proscription for conduct within its coverage. 511 F. 2d at 1000. However, as the court below recognized (Pet. App. 4a n.1), the Sixth Circuit in *Beck* appeared to be concerned about the prospect of multiple sentences for the same conduct, just as the D.C. Circuit was in *Canty*, upon which the *Beck* court principally relied. In any event, *Beck* preceded this Court's decision in *Culbert*, which the court below recognized requires a broad reading of the Hobbs Act.

Culbert, like the present case, involved a conviction under the Hobbs Act based on extortionate conduct directed at a bank president in an effort to obtain money from the bank. The court sustained the conviction,[4] noting the broad scope of the Hobbs Act:

> [T]he statutory language sweeps within it all persons who have "in any way or degree . . . affect[ed] commerce . . . by robbery or extortion." 18 U.S.C. §1951(a) (1976 ed.). These words do not lend themselves to restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).
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> Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal *all conduct within the reach of the statutory language*.

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[4]Petitioner suggests (Pet. 7) that the Court in *Culbert* expressly reserved the issue whether the Hobbs Act applies to extortionate conduct that would also be covered by the bank robbery statute. This suggestion is in error. The Court simply noted, in the footnote upon which petitioner relies, that the U.S. Attorney had conceded on appeal that the *bank robbery statute* did not apply in the particular circumstances of that case and that the Solicitor General had disavowed that concession in this Court. 435 U.S. at 372 n.1. The Court then stated that it expressed no view on the U.S. Attorney's interpretation of the bank robbery statute (*ibid.*). In upholding the conviction, the Court necessarily concluded that the Hobbs Act reached the conduct, and the Court did not intimate that this conclusion was in any way affected by whether the bank robbery statute also applied.

435 U.S. at 373, 380 (emphasis added). The fact that the bank robbery statute may reach the same conduct does not preclude the government from charging petitioner under the Hobbs Act. See *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979); *United States* v. *Naftalin*, 441 U.S. 768, 778 (1979). Because petitioner's conduct clearly fell within the Hobbs Act, the court below properly upheld its application in these circumstances.

2. Petitioner also argues (Pet. 9-11) that his post-arrest statements (see note 2, *supra*) were the product of "subtle in-custody interrogation." He concedes that he was not questioned by the FBI agents (Pet. 11). He claims, however, that after he was advised of his rights and requested counsel, the FBI agents engaged in a conversation much like the "Christian burial speech" at issue in *Brewer* v. *Williams*, 430 U.S. 387 (1977). This claim is without merit.

Petitioner did testify at a hearing on the admissibility of the statements that the FBI agents made remarks to the effect that the extortionate conduct involved in this case was "sloppy," that they could not understand how petitioner's girlfriend became involved, and that this case was not as "professional" as another they were investigating (Pet. App. 9a; Tr. 380-383). But the testimony of the FBI agents contradicted that of petitioner, and the district court credited the agents' testimony.

One of the FBI agents testified that the conversation during the brief trip to the FBI office consisted of "every day chatter" and that there was no conversation pertaining to the present case (Tr. 353, 360). The agent also testified that petitioner offered the statements at issue after long periods of silence because he "apparently felt like he had to say something" (Tr. 361) and that "[t]here was no provocation, or any statements to cause him to

make the statements" (Tr. 362). The other FBI agent testified that there had been no interrogation of petitioner (Tr. 365) and that "very little was said" during the ride (Tr. 366). He also responded in the affirmative to defense counsel's question whether "just all of a sudden [petitioner] started talking and started saying all these words, not out of response to any provocation or any interrogation whatsoever" (Tr. 367).

After receiving this testimony, the district court found that "the FBI did not ask any questions of [petitioner] and that he voluntarily, without any questioning on the part of the FBI agents, made the statements that he made" (Tr. 384; see also *id.* at 386). The court of appeals correctly observed that the "Trial Judge was certainly permitted to credit only the testimony of the FBI agents" and that the "Judge's finding is not clearly erroneous" (Pet. App. 9a). Further review of this factual claim is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner contends, however, that the courts below did not fully address and dispose of this issue because they concluded only that there had been no direct questioning of petitioner and did not determine whether there had been "subtle in-custody interrogation" that did not involve direct questioning (Pet. 10-11). This Court recently held, in *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980), that the *Miranda* safeguards "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent" and that the term "interrogation" in this setting includes words or actions that the police "should know are reasonably likely to elicit an incriminating response from the suspect" (slip op. 9; footnote omitted). But as the court of appeals noted, although the district court's finding "speaks in terms of 'questioning,' it is truly a finding—when read in

context with the rest of the record—that the FBI agents *neither* made *Brewer*-type 'statements' nor posed 'questions' as such" (Pet. App. 9a).[5] Thus, there is no basis for concluding that petitioner was "subjected to either express questioning or its functional equivalent" (*Rhode Island* v. *Innis*, *supra*, slip op. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]As noted above (see pages 6-7, *supra*), the district court's finding was made after hearing testimony by both FBI agents that not only had there been no "interrogation" (which may have connoted direct questioning), but that there had been no statements or other provocation causing petitioner to make the statements in question.

DOJ-1980-05